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No. 80-63

IN THE

# Supreme Court of the United States

October Term, 1980

RALEY'S, INC.,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

and

RETAIL CLERKS UNION, LOCAL 588 UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO,

*Intervenor.*

**Petition for Writ of Certiorari to Urited States Court of Appeals for the Ninth Circuit.**

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**Petition for Writ of Certiorari to United States Court of Appeals for the Ninth Circuit.**

## Questions Presented.

1. What standards are to be applied to determine whether statements of opinion lose First Amendment protection and may properly be treated as coercive promises?

2. What standards are to be applied to determine when speech alone warrants the issuance of a bargaining order?

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The petitioner, Raley's, Inc., respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on November 2, 1979.

**Citation to Opinion Below.**

The decision of the Court of Appeals, not yet reported in the Official Reports, is printed in the Appendix hereto.

**Jurisdiction.**

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 2, 1979. A timely petition for rehearing was denied on February 28, 1980. This Petition for Certiorari was filed within the time period set by the Court pursuant to its Order Extending Time. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

**Constitutional and Statutory Provisions Involved.**

Section 8(c) of the National Labor Relations Act and the First Amendment to the Constitution which are both set forth in the Appendix hereto.

**Statement of the Case.**

Raley's, Inc., the petitioner herein, operates retail supermarkets throughout Northern California, with its corporate offices located in Sacramento, California. All retail clerk supermarket employees are represented by affiliate locals of the United Food and Commercial Workers Union, including Retail Clerks Union, Local 588, the intervenor before the court below. (P. 16-17.)[1]

Local 588 commenced an organizing campaign among petitioner's corporate clerical employees in July, 1976. The

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[1] "P" references are to the record in the Court of Appeals reproduced as "Volume I, Pleadings."

Union filed its election petition with the National Labor Relations Board on July 14, 1976. A secret ballot election was held on October 20, 1976, which resulted in a majority vote against union representation.

Petitioner did not campaign against the Union until September, 1976, when it sent three letters to the affected employees. Neither the Union nor the Board contended these letters were in any way violative of the National Labor Relations Act, hereinafter the Act.

On October 14 and 15, 1976, three months after the election petition was filed, petitioner conducted four separate meetings among the employees eligible to vote. (P. 20.) Petitioner stated to the employees that the purpose of the meetings was to explain all existing company benefits and to answer any employee questions about those benefits. (P. 8, 25, 27, 51.) Before reviewing benefits, petitioner advised the employees that it could make no promises or commitments under the law. This statement was frequently repeated throughout each of the meetings and in particular, in response to employee complaints about wage rates and other requests for changed benefits. (P. 22, 23, 24, 33, 52.) In further response to employee complaints about rates of pay, petitioner responded only that its wages were "average" or "competitive", and that they would remain competitive in the future. Finally, the employees were told of the company's existing open-door policy wherein employees could and had taken complaints to various of petitioner's officials. (P. 17, 21, 24, 25, 34, 35.) Petitioner made no changes in any of its benefits, including wages, prior to the October 20, 1976 election.

As previously noted, the employees voted against union representation on October 20, 1976. On November 12, 1976, petitioner announced new wage rates for its office employees.

The Union filed objections to the results of the election and shortly after the wage increases were implemented also filed unfair labor practice charges. The objections and complaint on the unfair labor practice charges were consolidated for hearing before Administrative Law Judge Kennedy. After hearing, the Administrative Law Judge dismissed the unfair labor practice complaint, found the election objections to be without merit, and recommended certification of the election results. Upon review, the Board found that petitioner had called the employee meetings for the purpose of soliciting grievances; that it had made implicit if not explicit promises to raise wages by describing current and future rates as "competitive" or "average"; that by declaring its intent to prevent any coercive threats by its Chief Accountant it had promised a benefit, and finally, by announcing the pre-existing open-door policy, petitioner created a new benefit for some employees, even though others had previously availed themselves of it. On these facts and the later grant of wage increases during the pendency of the election objections, the Board ordered petitioner to recognize and bargain with the Union. The Board Order was enforced by the Ninth Circuit.

## REASONS FOR GRANTING THE WRIT.

The Ninth Circuit's decision in this case raises the substantial questions of what standards should be applied to determine when statements of opinion lose First Amendment protection and become coercive promises, and further, what standards should be used to determine when speech alone warrants the issuance of a bargaining order. The petitioner contends that the standards adopted by the Court below are in direct conflict with federal labor policy favoring vigorous debate in union campaigns and the First Amendment.

The applicable guidelines for balancing employee and employer rights as set forth in Sections 8(a)(1) and 8(c) of the Act have been articulated by this Court in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). However, the facts before the Court in those consolidated cases involved only threats of retaliation and not alleged promises of benefit. Accordingly, this Court did not examine what types of statements may properly be construed as promises of benefit and thereby lose the protection of the First Amendment or Section 8(c). The critical question of what kind of speech constitutes a coercive promise within the meaning of Section 8(c) was left undecided. This issue, in a day when campaign rhetoric has gone far beyond the realm of unabashed threats, has an impact on every unorganized employer's ability to communicate with its employees and to express its views on existing benefits and labor relations policies.

Since this Court's decision in *NLRB v. Gissel Packing Co., Inc., supra*, the Board has become mired in a morass of conflicts as to the appropriate standards to be applied in evaluating whether the mere holding of employee preelection meetings constitutes improper grievance solicitation which thereby creates an irrebuttable presumption of implied

promises to improve benefits. In *I.T.T. Telecommunications*, 183 NLRB 1129 (1970), the Board held that the solicitation of employee grievances was not in and of itself illegal unless accompanied by express or implied promises of benefits. Thereafter, in *Capitol Cement*, 191 NLRB 419 (1971), *Sportscoach Corp.*, 203 NLRB 145 (1973); *Mead Corp.*, 211 NLRB 657 (1974); *Rustcraft Broadcasting Co.*, 214 NLRB 29 (1974), and *Flint Provision Co.*, 219 NLRB 523 (1975), the Board held that the installation of a suggestion box, inquiries as to what employees were unhappy about, as well as their problems, and inquiries as to why employees wanted a union, along with assurances that problems could be worked out, were not illegal solicitations because they were not followed up by or accompanied with any promise of benefit.

A diametrically different approach, without reversing *I.T.T. Telecommunications, supra*, was adopted by the Board in *Reliance Electric Co.*, 191 NLRB 44 (1971), *affirmed* 457 F.2d 503 (6th Cir. 1972), and *Ken McKenzies, Inc.*, 221 NLRB 489 (1975), wherein the Board held that the solicitation of grievances creates an inference that the employer is impliedly promising to satisfy employee complaints. This intra-Board conflict has never been resolved. Indeed, the view adopted by the Board in the current case and affirmed by the Ninth Circuit is not shared by the Third Circuit Court of Appeals. *Landis Tool Co. v. NLRB*, 460 F.2d 23 (3rd Cir. 1972), *cert. denied* 409 U.S. 915 (1972); *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160 (3rd Cir. 1977). This is not an issue to be brushed aside by reliance upon the substantial evidence test. Rather, proper statutory construction is required.

Stated otherwise, the Board and the Ninth Circuit have adopted a *per se* rule that pre-election employee meetings are called to solicit grievances and further, that such solic-

itation implies a positive employer response. This result constitutes a dangerous infringement of First Amendment rights. A determination of these rights is not reserved exclusively for the Board as it requires substantial statutory construction to establish the parameters of First Amendment rights in election cases.

The Ninth Circuit's view that the Board drew proper inferences from petitioner's mere holding of an employee meeting is a gross misapplication of longstanding First Amendment principles. The issue is not whether there was substantial evidence to support the inferences drawn by the Board, but whether in the first instance the Board's statutory construction of free speech rights will have the effect of severely hindering vigorous debate in union election campaigns in derogation of longstanding federal labor policy.

Nearly every employer involved in a union organizing campaign communicates with its employees as to the current level of benefits so that all employees are aware of what is provided without the need for a union. Hardly an election goes by where employees fail to raise questions or complain about current benefits in such election meetings. Recognizing these well-settled facts, the Board held in *Uarco, Inc.*, 216 NLRB 1 (1974), that any inference of increased benefits may be specifically negated by repeated "no promise" responses to the employees' questions and complaints. *Uarco, Inc., supra*, has not been reversed. In the instant case, the Ninth Circuit held that petitioner's "no promise" pledge was negated by implied promises. This kind of gag order was rejected in *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245 (5th Cir. 1978), and *Robbins & Myers, Inc. v. NLRB*, 577 F.2d 382 (6th Cir. 1978). This conflict should be resolved so as to assure there is meaningful dialogue between employees and employers rather than abject silence which is the necessary result of the holding herein.

The issuance of a bargaining order where employees voted against union representation in the absence of any coercive conduct is the harshest remedy available to the Board. Its repercussions are far-reaching and impose serious burdens on all parties. The Ninth Circuit concluded that petitioner's characterization of current wage rates as "competitive", "average" or "on a par" with other employers and its announcement that various employee problems had been solved in the past and that alleged threats to discharge for protected activity would be controlled, justified the issuance of a bargaining order. This holding is in conflict with *NLRB v. General Telephone Directory Co.*, 602 F.2d 912 (9th Cir. 1979) and *NLRB v. Chatfield-Anderson Co.*, 606 F.2d 266 (9th Cir. 1979). More specifically, in *Chatfield-Anderson*, the employer had (1) interrogated employees; (2) threatened economic reprisals; (3) imposed stricter work rules; (4) withheld contemplated raises; (5) promised improved economic benefits and retroactive wages; (6) threatened to prolong negotiations; and (7) announced a new grievance resolution system. The Ninth Circuit concluded that a fair rerun election could be held. This serious conflict involving minor gradations of unfair labor practices, unless resolved by this Court, will result in a grievous miscarriage of justice for petitioner and its employees.

A substantial question is raised as to whether pre-election speech, absent other unfair labor practice conduct, may properly form the basis for a bargaining order and if so, what standards should be applied where the speech does not contain any implied threats. The impact of threatening remarks, as opposed to simple responsive electioneering, is far easier to identify, witness the Board's absolute quandary over whether mis-statements of fact may form the basis for overturning election results. *Hollywood Ceramics Co., Inc.*, 140 NLRB 221 (1962); *Shopping Kart Food Markets, Inc.*,

228 NLRB 1311 (1977); *General Knit of California, Inc.*, 239 NLRB No. 101 (1978).

The Ninth Circuit's view in the instant case is in conflict with that of the Fourth Circuit's recent decision in *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979). There, the Court refused to enforce a bargaining order where the offenses involved only minor Section 8(a)(1) transgressions. Moreover, the Ninth Circuit's holding is contrary to *NLRB v. Gissel Packing Co., Inc., supra*, and has resulted in a substantial erosion of employer First Amendment rights to be heard, and, of equal significance, employee rights to listen, be informed and evaluate.

**Conclusion.**

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX A.

### Copy of the Memorandum Decision of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Raley's Inc., Petitioner, v. National Labor Relations Board, Respondent, and Retail Clerks Union, Local 588, Retail Clerks International Union, AFL-CIO, Intervenor. No. 78-2398.

[November 2, 1979].

Appeal from the National Labor Relations Board.

Before: DUNIWAY and ELY, Circuit Judges, and FITZGERALD*, District Judge.

The Decision and Order of the National Labor Relations Board is reported at 236 NLRB No. 97 (1978). The Board, reaching a finding contrary to that previously made by an Administrative Law Judge, held that Raley's, the employer, had committed an unfair labor practice in connection with a certification election, thereby violating Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. Sections 158(a)(1) and (5). The Board further determined that the involved union did, in fact, represent a majority of the employees in the bargaining unit and ordered the employer, upon request, to recognize and bargain with the union. Raley's has petitioned for review, and the Board has cross-petitioned for enforcement.

A Board order will be upheld if there is "substantial evidence" in the record to support it. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Unless questions of testimonial credibility are implicated, the standard of review does not change simply because the Board decision is at

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*The Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

variance with the findings of an Administrative Law Judge. *Loomis Courier Service, Inc. v. NLRB*, 595 F.2d 491, 495-6 (9th Cir. 1979); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 409 (9th Cir. 1978); *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1347 (9th Cir. 1978). *Cf. Nelson v. Interior Board of Land Appeals*, 598 F.2d 531, 533-4 (9th Cir. 1979).

Our resolution of the cause does not depend upon an assessment of the relative credibility of witnesses, but rather, upon the inferences that may be drawn from uncontested evidence. We have concluded that the Board's decision is appropriately based on reasonable inferences derived from undisputed facts. The decision is therefore supported by "substantial evidence." Accordingly, we reject the contentions advanced by Raley's in its Petition for Review and grant the Cross-Petition of the Board.

The Board's Order will be ENFORCED.

## APPENDIX B.

### Amendment I to the United States Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## APPENDIX C.

### United States Code, Title 29, Section 158(c).

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

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RALEY'S, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD
and
RETAIL CLERKS UNION, LOCAL 588, affiliated with
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

### QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) of the National Labor Relations Act by soliciting grievances from its employees in order to discourage their support for the Union[1] and by promising its employees improved wages

[1] Retail Clerks Union, Local 588, affiliated with Retail Clerks International Association, AFL-CIO.

and other benefits if they voted against union representation.

2. Whether, in light of petitioner's serious and pervasive violations of the National Labor Relations Act, the Board reasonably exercised its remedial authority in ordering petitioner to bargain with the Union.

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## OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-2) is reported at 608 F.2d 1374. The decision and order of the Board (App., *infra*)[2] are reported at 236 N.L.R.B. 971.

## JURISDICTION

The judgment of the court of appeals was entered on November 2, 1979. A timely petition for rehearing was denied on February 28, 1980. On May 20, 1980, Mr. Justice Rehnquist extended time for filing a petition for a writ of certiorari to and including July 15, 1980. The petition was filed on July 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Section 8(c) of the National Labor Relations Act, 29 U.S.C. 158(c), is set forth at page 4 of the appendix to the petition for a writ of certiorari. Other relevant provisions of the Act are as follows:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.
>
> Section 8(a) It shall be an unfair labor practice for an employer—

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[2] The Board's decision is not printed in the appendix to the petition. We have reprinted it in the appendix to this brief.

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7];

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees.

## STATEMENT

1. Pursuant to a petition filed by the Union, the Board scheduled a representation election to be held among petitioner's corporate headquarters office employees on October 20, 1976 (App., *infra*, 12a).[3]

On October 14, 1976, less than a week prior to the scheduled representation election, petitioner's controller, Keith Tronson, and its vice-president, James Teel, conducted three separate meetings with groups of between 10 and 15 unit employees. The meetings, which had been preceded, on September 7 and October 8, by letters from Teel to the employees arguing against Union representation (App., *infra*, 21a, 36a–37a) followed the same general format. Tronson opened each meeting by explaining the mechanics of the scheduled election and then proceeded to describe petitioner's existing benefits (App., *infra*, 2a, 22a, 30a, 32a). Tronson also stated at the outset of each meeting that the Company was precluded by law from making promises or commitments to the employees (*id.* at 22a, 30a–31a, 32a–33a). After completing his opening remarks, Tronson opened up each meeting for employee questions and comments (*id.* at 22a, 31a, 33a).

Among the matters most persistently complained about were the employees' wage rates and asserted mistreat-

[3] In July, the Union, based on authorization cards from a majority of employees, had made a recognition demand on petitioner. Petitioner replied that it would not recognize the Union until it was certified by the Board (App., *infra*, 20a).

ment by supervisors (App., *infra*, 2a, 22a–23a, 26a–27a, 31a–32a, 33a–34a). In response to employee complaints about wages, Tronson and Teel stated that petitioner "attempted" or had the "intention" to be competitive in the wages it paid (Tr. 290, 524).[4] Tronson promised to find out why the employees had a problem with the chief accountant (Tr. 359–360, 373) and told them that they could "come to us" and "if they had a problem, we would deal with it as best we could" (Tr. 213, 228, 268, 284). Tronson and Teel also told employees that petitioner had an "open door" policy whereby employees could discuss their problems with them, or leave notes in their mailboxes, if they felt they could not go to their immediate supervisors (App., *infra*, 2a, 27a–28a, 32a, 34a; Tr. 42, 50, 60, 72, 83, 90, 106, 123, 163, 165–166, 184, 192, 213, 228, 268, 284, 353, 360–361, 368–369, 374, 423, 481, 487, 495–496, 528–529, 545, 610). Tronson and Teel had never before informed employees that they could come to them with personal problems (Tr. 269, 272, 274–275, 541).

On October 20, an election was held which the Union lost by a vote of 23 to 21 (App., *infra*, 2a n.3). On October 22, Tronson issued a memo to all office employees and their supervisors informing them that he was in the process of making a detailed salary evaluation and that there would be a change in the wage structure retroactive to October 25 (App., *infra*, 5a, 37a). On November 12, while Union-filed objections to the election were pending, petitioner implemented a wage increase for the employees through the issuance of a pay schedule with an effective date of October 26 (App., *infra*, 37a–38a). The wage increase affected virtually all unit employees, was quite large in relation to previous wage increases, and for the

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[4] "Tr." references are to the transcript of the unfair labor practice hearing before the Administrative Law Judge.

first time took seniority into account in determining the wages of petitioner's central office employees (App., *infra*, 37a–39a).

2. The Board found that the Company violated Section 8(a)(1) of the Act by soliciting grievances from its employees concerning their working conditions in order to discourage them from joining or supporting the Union, and by impliedly promising employees improved wages and other benefits if they voted against union representation. The Board also found that the Company violated Section 8(a)(1) and (5) of the Act by changing the wage structure of its central office employees to reward them for voting against union representation. Finally, the Board concluded that, as of July 12, the Union represented a majority of the Company's employees in an appropriate unit, and that the Company's subsequent unlawful conduct interfered with the employees' freedom of choice in selecting a bargaining representative and warranted setting aside the October 20 election. (App., *infra*, 7a–9a.) The Board's order requires the Company, *inter alia*, to recognize and bargain, upon request, with the Union (*id.* at 9a–10a).

In finding that it made promises of benefits at the October meetings, the Board rejected petitioner's assertion that its statements at the beginning of the meeting effectively disavowed any intent to promise benefits. The Board stated (App., *infra*, 3a–4a):

> [W]e conclude that the employees clearly were led to believe that the expressed abuses would be remedied and that any future incidents would be subject to the control of Tronson and Teel. With respect to the responses concerning wages [petitioner's] promise to remedy wage deficiencies to the extent of making them competitive is patent, indeed, almost explicit.
>
> Any doubt on this score is eliminated by statements made by Teel and Tronson which are in direct con-

> tradiction to a true "no promises" position. At these meetings, [petitioner] announced an "open door" to Tronson and Teel for the discussion of any employee problems. Such access, which had not been announced previously, was unknown to some or most of the employees and therefore for them did not exist in practice. The fact that some employees had in the past taken the initiative to discuss grievances with Tronson and Teel does not indicate otherwise. This announcement of a new or expanded avenue of access constitutes not merely a promise of an additional benefit, but rather its implementation.

Concerning the post-election wage raises, the Board concluded (App., *infra*, 6a–7a):

> It appears that the raises cannot be fully justified as merely an attempt to correct improperly implemented wage adjustments made during the previous summer * * *. Specifically, the evidence fails to show that seniority was ever intended to be a factor in computing the wage adjustments at that time. This deficiency was first noted during the employee meetings just prior to the representation election. Rather than exonerating [petitioner] from a finding of an 8(a)(1) and (5) violation because this grievance had some basis in fact, these raises conveniently served the double purpose of eliminating wage inequalities in fulfillment of the implied promise of benefit made at the meetings as well as rewarding employees for their rejection of the Union * * *.

The Board considered a bargaining order to be appropriate because "[i]n the face of such substantially changed terms of employment, particularly considering the scope and size of the wage increases, we conclude that the effects of such misconduct would carry over into a rerun election and improperly affect its results" (App., *infra*, 8a–9a).

3. In a memorandum opinion, the court of appeals held that the Board's unfair labor practice findings were supported by substantial evidence, and accordingly enforced the Board's order (Pet. App. 1–2).

## ARGUMENT

1. Petitioner contends that the Board, in finding that it unlawfully solicited grievances and impliedly promised to remedy them at the October 14 pre-election meetings held with groups of employees, ignored its own past decisions as well as those of other reviewing courts, and improperly applied a per se rule that any such pre-election meetings are called to solicit grievances. There is no merit to this claim.

It is well established that an employer violates Section 8(a)(1) of the Act by soliciting employee grievances while a representation election is pending, where the grievance solicitation is accompanied by express or implied promises to remedy the grievances aired by the employees if the union is rejected. See *NLRB* v. *Pilgrim Foods, Inc.*, 591 F.2d 110, 115 (1st Cir. 1978); *NLRB* v. *Eagle Material Handling, Inc.*, 558 F.2d 160, 164 (3d Cir. 1977); *NLRB* v. *Tom Wood Pontiac, Inc.*, 447 F.2d 383, 384–385 (7th Cir. 1971).

In finding that the October 14 pre-election meetings were held for the purpose of soliciting employee grievances, the Board relied on the facts that the meetings were initiated by petitioner, admittedly in response to the ongoing union representation campaign, and were structured so that employees were encouraged to voice their grievances. With the exception of Controller Tronson's brief opening remarks at each meeting, the meetings were entirely devoted to eliciting and responding to employee inquiries and complaints. The Board also found it significant that the October 14 meetings represented the first

time that high-ranking management officials had met with groups of petitioner's central office employees (App., *infra*, 2a). In addition, the timing of the meetings—coming six days before the scheduled representation election—suggested that they were designed to discourage support for the Union, by demonstrating to the employees that petitioner was now prepared to listen to their problems and complaints. The Board's finding that management officials impliedly promised to remedy the major grievances aired by employees at the October 14 meetings was also based on the record. Thus, the Board found, upheld by the court of appeals, that petitioner announced its intention to provide access to higher management for grievance resolution and impliedly promised to rectify wage inequalities.

Thus the only question actually presented here is whether substantial evidence supports the Board's finding, upheld by the court of appeals, that Tronson's and Teel's conduct belied their assertion that they could make no "promises" or "commitments."[5]

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[5] *Uarco, Inc.*, 216 N.L.R.B. 1 (1974) (Pet. 6), in which the Board concluded that an employer's stated position that it could make no promises was sufficient to rebut the inference of an implied promise to remedy grievances that arises from the pre-election solicitation of employee grievances is readily distinguishable from the instant case. In *Uarco*, unlike the present case, the employer made no other statements contradicting its "no promise" position or implying that employee grievances would be remedied.

Petitioner's reliance on *Federal-Mogul Corp.* v. *NLRB*, 566 F.2d 1245 (5th Cir. 1978) and *Robbins & Myers, Inc.* v. *NLRB*, 577 F.2d 382 (6th Cir. 1978) is also misplaced. *Federal-Mogul Corp.* involved very generalized statements made by an employer in response to union campaign propaganda, not the solicitation of grievances from employees. 566 F.2d at 1254. In *Robbins & Myers, Inc.*, *supra*, 577 F.2d at 383, the court concluded that there was no substantial evidence to support the Board's finding that an employer's discussion of planned, regular salary adjustments amounted to an implied promise of benefits; the court did not rely on the employer's stated "no promise" position in reaching that result.

The cases on which petitioner relies (Pet. 5) held that solicitation of employee grievances in a pre-election context is not in itself unlawful, unless the employer also promises to rectify the grievances in order to discourage union support. Thus, in each of the Board decisions relied on by petitioner (Pet. 5), in which an employer's solicitation of employee grievances was found not to be violative of the Act, the Board relied either on the fact that the solicitation was not accompanied by express or implied promises to remedy the grievances or the lack of any evidence indicating that the employer sought to discourage support for the union. Accordingly, these decisions are distinguishable on their facts from the instant case.[6]

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[6] In *I.T.T. Telecommunications*, 183 N.L.R.B. 1129 (1970), the Board found that the employer's solicitation of grievances was not accompanied by promises of benefits aimed at interfering with the organizational efforts of employers.

*Capital Cement Div. of Capital Aggregates, Inc.*, 191 N.L.R.B. 419 (1971), involved the legality of a supervisor's suggestion to an employee that he should take his complaints to the company president. The Board found (*id.* at 420) that this statement was not accompanied by any promises or threats, and that the employer did not engage in a pattern of unfair labor practices from which an intent to coerce employees could be inferred.

In *Sports Coach Corp. of America*, 203 N.L.R.B. 145, 152–153 (1973), the Board concluded that a company official's statement, made at a pre-election meeting, that a suggestion box was being installed where employees could register their grievances and complaints was not unlawful, where there was no plea to refrain from union support and no implied promises that such grievances would be remedied. However, in the same case the Board found that the employer's solicitation of the formation of an employee grievance committee was violative of the Act. *Id.* at 150.

In *F.C.F. Papers, Inc., a Division of the Mead Corp.*, 211 N.L.R.B. 657 (1974), the Board held that an employer's statements regarding the resolution of employee problems did not violate the Act because the employer did not, directly or implicitly, condition any planned action on employee rejection of the union.

The Board concluded in *Rust Craft Broadcasting Co.*, 214 N.L.R.B. 29, 34 (1974), that the solicitation of an individual employee's griev-

There is also no merit to petitioner's assertion (Pet. 4) that the statements of its management officials implying that employee grievances would be remedied were lawful because they constituted "free speech" protected under Section 8(c) of the National Labor Relations Act. Section 8(c) explicitly provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof * * * shall not constitute or be evidence of an unfair labor practice * * * *if such expression contains no threat of reprisal or force or promise of benefit*" (emphasis supplied). *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Here, petitioner's statements *were* found to promise benefits.

2. The additional issue urged by petitioner (Pet. 7)—whether a bargaining order properly may be based solely on non-threatening pre-election speech—is not raised on this record. In concluding that a bargaining order was warranted in the instant case, the Board did not rely solely on petitioner's unlawful "pre-election speech" impliedly promising to remedy employee grievances, or its conduct in holding pre-election meetings devoted to eliciting and responding to employee complaints. Rather, in fashioning its order, the Board found particularly significant petitioner's grant of a large post-election wage increase to its employees, which served as a convincing fulfillment of its earlier promises that employee grievances would be remedied if the Union was defeated and which removed the employees' single most important motive for organization by raising their wages to a competitive level.

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ances by a company official was not unlawful, since his statements "contained no promise of benefit, either express or implied."

Likewise, in *Flint Provision Co.*, 219 N.L.R.B. 523 (1975), the Board found that an employer's solicitation of grievances from employees was "unaccompanied by any promise of benefit."

The Board and the courts have consistently held that a bargaining order is appropriate in circumstances where an employer grants benefits—such as wage increase—to employees for the purpose of improving working conditions intimately related to the employees' desire to organize, since such conduct is likely to have the "lingering" effect of discouraging employee support for union representation, thereby precluding the holding of a fair rerun election. See, *e.g.*, *NLRB* v. *Eagle Material Handling, Inc.*, *supra*, 558 F.2d at 166–168; *Texaco, Inc.* v. *NLRB*, 436 F.2d 520, 524–525 (7th Cir. 1971); *American National Stores, Inc.*, 195 N.L.R.B. 127, enf'd per curiam, 471 F.2d 656 (8th Cir. 1972). Thus, petitioner's violations of the National Labor Relations Act were not merely "minor Section 8(a)(1) transgressions," as petitioner asserts (Pet. 8), and the cases it relies upon in which reviewing courts denied enforcement of Board bargaining orders are distinguishable.[7]

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[7] In *NLRB* v. *Chatfield-Anderson Co., Inc.*, 606 F.2d 266, 269 (9th Cir. 1979), the court, in denying enforcement of a Board bargaining order, relied on evidence indicating that "the effect of the more severe violations was mitigated before the election by express disavowals of the company president," and concluded that the remaining violations were "trivial" in nature.

In *NLRB* v. *Appletree Chevrolet, Inc.*, 608 F.2d 988, 998 (4th Cir. 1979), the court noted that "[t]he primary reason assigned by the Board for a bargaining order was the finding of discriminatory discharges." The court, however, reversed the Board's finding as to the discriminatory discharges and concluded that the employer's remaining Section 8(a)(1) violations were not sufficiently serious to warrant a bargaining order. 608 F.2d at 998.

*NLRB* v. *General Telephone Directory Co.*, 602 F.2d 912 (9th Cir. 1979), also fails to support petitioner's position that a bargaining order was not warranted in the instant case. Indeed, that case did not even involve the propriety of a Board bargaining order, but rather was concerned solely with the legality of alleged threatening statements made by an employer—a type of violation not alleged in the instant case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

WILLIAM A. LUBBERS
*General Counsel*

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SEPTEMBER 1980

## APPENDIX

**Raley's Inc.** ***and*** **Retail Clerks Union, Local 588, Affiliated with Retail Clerks International Association, AFL-CIO.** Cases 20–CA–12229 and 20–RC–13645

June 16, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND TRUESDALE

On October 28, 1977, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and a supporting brief, Respondent filed cross-exceptions and a supporting brief, and the Charging Party filed a brief in reply to Respondent's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent conducted a series of three preelection meetings on October 14, 1976,[2] prior to the October 20 representation election.[3] Approximately 10 office employees, or roughly one-fourth of the unit, were invited to and did attend each meeting. Respondent's controller, Keith Tronson, presided over the meetings and was assisted by Vice President James Teel. The record indicates that this series of meetings was the first time that these employees had met as a group with management officials other than their immediate supervisors. The format of all the meetings, each lasting 1 to 1½ hours, was in all important respects identical. Tronson testified that he started the meetings by informing the employees of the October 20 representation election and describing the procedures involved. Thereafter, he explained in detail Respondent's existing wages and fringe benefits for the office employees, many of which were brought to the attention of some employees for the first time. In addition, Tronson announced that he could make no promises or commitments because the law precluded it. After these benefits had been explained, Respondent's representatives invited questions from the employees.

As detailed in the Administrative Law Judge's Decision, the questions covered a range of topics and were not limited to matters covered in Tronson's speech. The employees repeatedly complained about their pay scales, the sick pay policy, asserted mistreatment by supervisors, and the

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[2] All dates are 1976 unless otherwise indicated.

A fourth meeting was held on October 15. However, no specific evidence was presented regarding what occurred during this fourth meeting.

[3] As a result of the election, a majority of employees cast ballots indicating they did not choose to be represented. The tally of ballots shows that of approximately 45 eligible voters, 21 voted for representation by the Union and 23 voted against. Two ballots were void.

absence of a policy allowing for the transfer of central office employees to Respondent's retail stores. At each meeting the bulk of the time was spent answering such employee inquiries. In responding to those complaints and questions, Respondent reiterated the phrase that it could make no promises with respect to the problems the employees were raising. While accepting the credibility resolutions made by the Administrative Law Judge, specifically, that neither Tronson nor Teel ever stated that the criticisms expressed by the employees would be "looked into," the record, as credited, clearly reveals that Respondent made additional statements at these meetings not wholly in accord with its disavowals of promises.

First, credited testimony indicates that Tronson, upon learning of alleged abuses by a supervisor, became upset and said he would "find out why" there was a problem. Tronson himself testified that, at the time, he informed the employees that they "could come to us, and because we are the supervisors of their supervisors that we had control over the, over the supervisors. And that if they had a problem, we would deal with it as best we could." Furthermore, Tronson and Teel admitted that they stated to employees that Respondent "tried," "attempted," or had the "intention" to be "competitive" in the wages it paid. These statements were made in the meetings with the employees in answer to employees' complaints about wages, which was one of their principal concerns. At the hearing, Respondent acknowledged that its wages were not competitive.

In view of the foregoing, we conclude that the employees clearly were led to believe that the expressed abuses would be remedied and that any future incidents would be subject to the control of Tronson and Teel. With respect to the responses concerning wages Respondent's promise to

remedy wage deficiencies to the extent of making them competitive is patent, indeed, almost explicit.

Any doubt on this score is eliminated by statements made by Teel and Tronson which are in direct contradiction to a true "no promises" position. At these meetings, Respondent announced an "open door" to Tronson and Teel for the discussion of any employee problems. Such access, which had not been announced previously, was unknown to some or most of the employees and therefore for them did not exist in practice. The fact that some employees had in the past taken the initiative to discuss grievances with Tronson and Teel does not indicate otherwise. This announcement of a new or expanded avenue of access constitutes not merely a promise of an additional benefit, but rather its implementation.

As this Board has previously held,[4] the structure of such preelection meetings provides a "compelling inference" that the employer by its conduct at such meetings impliedly promises that the grievances raised would be corrected. Were we to conclude that Respondent, by merely reciting a "no promises" formula, had clearly discharged its duty to avoid giving the employees the impression that their complaints would be remedied,[5] we would be forced to conclude that the parties at these meetings were engaged in a largely meaningless exchange concerning the employees' grievances and complaints. However, it is apparent that the reason for their voicing such complaints was the hope that they might be remedied. Clearly, as re-

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[4] *Reliance Electric Company, Madison Plant Mechanical Drives Division*, 191 NLRB 44, 46 (1971).

[5] Member Jenkins finds that the inference of implied benefits stemming from such preelection meetings is irrebuttable, and that in any case Respondent's "no promises" sloganeering does not provide Respondent with a defense to such violative conduct. Compare his dissent in *Uarco Incorporated*, 216 NLRB 1, 3 (1974).

flected in the Administrative Law Judge's Decision, the adamancy with which the employees continued to express their grievances and Respondent continued to entertain them, despite such formalized disavowals by Respondent that any changes would ensue, sufficiently indicates that such disavowals were not tendered or taken at face value. Thus, we conclude that Respondent's oft-repeated stock phrase of "no promises" was a mere formality, serving only as an all-too-transparent gloss on what is otherwise a clearly implied promise of benefit.

In view of the above, we find that Respondent coerced employees in violation of Section 8(a)(1) of the Act by its solicitation of employee grievances and its implied promises to remedy them. It follows that such conduct interfered with the employees' freedom of choice in the election and we shall set aside the results of the first election.

In addition, as one of the grievances raised by the employees at all of the meetings held on October 14 concerned the need for restructuring and increase in their pay scales, it is apparent that Respondent impliedly promised that it would correct this source of discontent. In fact, the record reveals that this was by no means a hollow promise on the part of Respondent. The evidence indicates that it has generally been Respondent's policy to readjust the wages of employees who are to receive increases in the middle and at the end of the calendar year. However, on October 22, Respondent announced that it was reformulating its pay scales and that the raises to be announced in the near future would be made retroactive to a period within a week of the election. In the announcement, Tronson invited the employees to submit to him information which would aid him in evaluating current wage levels. When the wage adjustments were announced on November 12, practically every employee received a wage

increase, which for most of the employees exceeded 20 percent of their previous income. Prior increases had been somewhat more modest in amount and were never given to more than approximately half of the employees.

Respondent attempted to explain the size and the scope of this increase on the basis of two factors. First, when the previous June 1976 wage increase had been given, the person responsible for implementing the increase had improperly utilized an area wage survey compiled by an employers' association, and had consequently pegged the raises to the information compiled regarding the lower wage ranges for the "general" employee category, as opposed to the intended midrange wage of the "skilled" employee category. Second, it had become apparent that the existing wages did not reflect employee seniority and that some newer employees were earning sums in excess of the wages of more senior employees similarly situated. This was the first time seniority had been taken into account in determining employees' wage levels. According to Tronson, he decided not to wait until December, when wages would ordinarily have been adjusted, because he had decided that Respondent had conducted a "clean campaign" and could now grant immediate increases, as it wished to eliminate as soon as possible the effects of previous errors made regarding wage adjustments.

However, Respondent's explanation is insufficient independent justification, and we find that it is inescapable that the raises were intended to serve as a reward to the employees for their rejection of union representation.[6] The fact that the raises were tailored to eliminate inequities resulting from the previously unstructured system does not provide such "legitimate business justification" as to make the raises proper. It appears that the raises cannot

[6] *Westminister Community Hospital, Inc.*, 221 NLRB 185 (1975).

be fully justified as merely an attempt to correct improperly implemented wage adjustments made during the previous summer and the Administrative Law Judge noted that he did not rely on this rationale. Specifically, the evidence fails to show that seniority was ever intended to be a factor in computing the wage adjustments at that time. This deficiency was first noted during the employee meetings just prior to the representation election. Rather than exonerating Respondent from a finding of an 8(a)(1) and (5) violation because this grievance had some basis in fact, these raises conveniently served the double purpose of eliminating wage inequalities in fulfillment of the implied promise of benefit made at the meetings as well as rewarding employees for their rejection of the Union. As such, Respondent violated the Act in this regard.

## CONCLUSIONS OF LAW

1. The Respondent, Raley's, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union, Local 588, affiliated with Retail Clerks International Association, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, on October 14 and 15, solicited grievances from employees concerning their working conditions in order to discourage them from joining or supporting the Union or designating or selecting the Union as their collective-bargaining representative, and on those dates did promise employees improved wages or other benefits if the employees voted against union representation, and therefore violated Section 8(a)(1) of the Act.

4. Respondent, on or after October 26, changed the wage structure of its central office employees in order to reward them for having voted against union representa-

tion and therefore violated Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

5. By its conduct, as set forth above, Respondent has interfered with its employees' freedom of choice in selecting a bargaining representative, and such conduct warrants setting aside the election conducted on October 20 in Case 20–RC–13645.

## REMEDY

Under the facts of this case, it is clear that the violations of the Act committed by Respondent served to undermine the majority status of the Union which it had achieved prior to the election.[7] Since the improper solicitation of grievances requires that the first election be set aside, we must further determine whether Respondent's conduct has rendered doubtful or impossible the holding of a free and fair rerun election. In these circumstances, it appears that Respondent became fully apprised of its employees' motivation in seeking the assistance of a collective representative through its solicitation of grievances. As a result of its conduct during the preelection meetings and its grant of postelection wage increases, which we have found were in violation of the Act, Respondent attempted to extripate the source of the employees' interest in collective representation. Specifically, Respondent in effect assured its employees that any abusive conduct by supervisors would not reoccur; that they could freely communicate employment-related problems to Respondent; and that through the postelection wage increase they were liberally rewarded for their rejection of union representation. In the face of such substantially changed terms of employment, particularly considering the scope and size of

[7] The Administrative Law Judge found that, as of July 12, the Union had obtained, on authorization cards, the valid signatures of 30 employees—a majority of those within the unit.

the wage increases, we conclude that the effects of such misconduct would carry over into a rerun election and improperly affect its results. Accordingly, we find that a bargaining order is appropriate in this situation[8] as the only effective remedy for Respondent's unlawful conduct.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Raley's, Inc., Sacramento, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Conducting meetings with groups of its employees for the purpose of hearing and adjusting employee grievances or complaints and explicitly or impliedly promising them economic benefits or improved working conditions in order to interfere with their choice of a bargaining representative, or as an inducement to reject and refrain from activities in support of Retail Clerks Union, Local 588, affiliated with Retail Clerks International Association, AFL-CIO, or any other labor organization.

(b) Granting wage increases to its employees in order to induce them to reject the Union as their collective-bargaining representative, but without prejudice to any wage increase or other economic betterments heretofore granted.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

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[8] *Doces Sixth Ave., Inc.*, 225 NLRB 806 (1970); *Westminster Community Hospital, Inc., supra; Royal Aluminum Foundry, Inc.*, 208 NLRB 102 (1974).

(a) Upon request, recognize and bargain collectively with Retail Clerks Union, Local 588, affiliated with Retail Clerks International Association, AFL–CIO, as the exclusive bargaining representative of the employees in the following appropriate unit, and, upon request, embody in a signed agreement any understanding reached:

> All full-time and regular part-time accounting office clerical employees, general office clerical employees and advertising department employees of Raley's, Inc., at its 1515 20th Street facility in Sacramento, California; excluding all other employees, guards and supervisors as defined in the Act.

(b) Post at its Sacramento, California, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election held on October 20 among Respondent's employees be set aside, and that the petition in Case 20–RC–13645 be, and it hereby is, dismissed.

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT conduct meetings with groups of our employees for the purpose of hearing and adjusting their grievances or complaints, and directly or impliedly promising them benefits or improved working conditions, in order to discourage our employees from voting, joining, or supporting Retail Clerks Union, Local 588, affiliated with Retail Clerks International Association, AFL–CIO, or any other union.

WE WILL NOT grant to our employees wage increases in order to induce them to reject the above-named Union, or any other labor organization whom they select as their collective-bargaining representative, but without prejudice to any wage increases or other economic betterments heretofore granted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their organizational rights guaranteed under the National Labor Relations Act, as amended.

WE WILL, upon request, recognize and bargain collectively with the above-named Union as the exclusive bargaining representative of the employees in the following appropriate unit, and, upon request, embody in a signed agreement any understanding reached:

> All full-time and regular part-time accounting office clerical employees, general office clerical employees and advertising department employees of Raley's, Inc., at its 1515 20th Street facility in Sacramento, California; excluding all other employees, guards and supervisors as defined in the Act.

RALEY'S, INC.

## DECISION

### STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me on May 17, 18, and 25, 1977, at Sacramento, California, pursuant to a complaint in Case 20-CA-12229 issued by the Acting Regional Director for Region 20 of the National Labor Relations Board on January 32, 1977. The complaint is based upon a charge filed by Retail Clerks Union, Local 588, affiliated with Retail Clerks International Association, AFL-CIO (herein called the Union), on December 6, 1976.[1] The complaint against Raley's, Inc. (herein called Respondent) alleges that it has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended.

On July 14, the Union filed a petition in Case 20-RC-13645 seeking a representation election among certain of Respondent's central office employees in Sacramento. After a hearing, the Regional Director issued a Decision and Direction of Election in an appropriate unit. The election was held on October 20. The tally of ballots issued on that date shows that, of approximately 45 eligible voters, 21 voted for representation by the Union and 23 voted against. Two ballots were void. Thereafter, on October 26, the Union filed 13 objections to conduct affecting the outcome of the election; and, on December 21, the Acting Regional Director issued a supplemental decision, followed by a second supplemental decision on December 28, in which he overruled 10 of those objections, but ordered a hearing on the remaining 3. These three, in substance, alleged that Respondent interfered with the outcome of the

[1] Hereinafter all dates are 1976 unless otherwise noted.

election by (1) dealing directly with employees in soliciting their grievances and advising them to take their problems directly to the Employer, thereby impliedly promising that grievances and problems would be resolved, and (2) impliedly promising employees that pay or other benefits would be improved in the event that they voted against union representation. On January 31, 1977, the Acting Regional Director ordered the complaint and objections consolidated as they involved a single controversy.

Issues

The principal issue is whether or not Respondent, prior to the October 20 election at a series of meetings held on October 14 and 15 with voting unit employees, committed unfair labor practices by making implied promises of benefits and soliciting grievances. Assuming that there is sufficient proof to sustain those allegations, I must determine whether or not a bargaining order should issue based upon those violations. If I determine that those violations are insufficient to warrant a bargaining order, I then must determine whether or not the wage increase given after the election also constitutes an unfair labor practice and, if so, whether or not a fair second election can be held or whether a bargaining order should issue. In the event that I conclude there is insufficient evidence of preelection unfair labor practices, I must nonetheless determine whether or not the postelection wage increase constituted an unfair labor practice and, if so, whether the remedial order should include a directive setting aside the election and ordering Respondent to bargain with the Union.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of all parties.

Upon the entire record[2] of the case and from my observation of the witnesses and their demeanor, I make the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF THE EMPLOYER

Respondent admits, and I find, that at all material times it has been a California corporation with its corporate headquarters in Sacramento, California, where it is engaged in the retail sale and distribution of food products and general merchandise. During the past calendar year, its gross sales exceeded $500,000, and it purchased goods valued in excess of $50,000 directly from suppliers located outside the State of California. Accordingly, it admits, and I find, that at all times material herein it has been an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2),(6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *Background*

Respondent operates a chain of drug stores and supermarkets. It has approximately 25 stores in California and 15 stores in Nevada. Some of its stores are freestanding

[2] In reviewing the exhibit folders, I noticed a number of defects including the fact that no exhibit bears the court reporter's official stamp, which is used as a tool for indexing as well as to show the document to be the one actually offered. The lack of indexing resulted in several errors which the parties subsequently agreed to correct.

ever, slightly contrary to DeRaps, she testified Tronson said employees should check the newspapers to see what kind of wages competing employers offered saying he had done so and believed the Company was "on a par." She also recalls him saying he could "not guarantee anything."

Both Fuller and Martinez agree that Tronson prefaced each of his discussions with a phrase to the effect that he could make no promises. Unlike DeRaps and Forge, however, they both testified Tronson did not say he would "look into" things. They also deny Tronson said anything to the effect that he was in the process of checking into wage matters or conducting a wage survey. Martinez recalled Tronson said Respondent's pay scale was somewhere "in the middle," and employees could check the newspaper want ads if they wished to compare wages. Fuller recalls she complained to Tronson that current salary levels were impossible to live on, and he responded by saying he couldn't make promises on salaries. She agrees with Martinez that Tronson said nothing about wage surveys but does not believe either Teel or Tronson mentioned looking in the newspaper.

Both Teel and Tronson deny they in any way offered to review the pay scales. They did admit they suggested employees look in the newspaper to see if Respondent's wages were competitive. Tronson denied he said that he was preparing a wage schedule averring that such a statement would have been a waste of time, for he was concentrating on winning the election and was then under the belief that it was likely the Union would win. Moreover, he says, Respondent's attorney, Jordan, had admonished both him and Teel not to make such statements and so they did not.

On balance, I conclude that the more credible of these versions is that of Tronson, Teel, Martinez, and Fuller. I

**PREVIOUS PAGES MISSING**
**15a – 22a**

reach this conclusion because DeRaps and Dorge tended to overreach and add material which is inherently unlikely. For example, DeRaps testified as follows:

> Q. (By Mr. Jordan) Did [Tronson] say he had looked [in the newspaper] because he thought the wage policy was pretty competitive with what was being paid in the industry?
>
> A. At our meeting, he stated—in the beginning, in the first part of the meeting, he said that no way we were going to make $6.00 or $7.00 an hour. But, then, during the part of the meeting, when it was more or less opened for discussion and we were speaking about wages, he said, "I can't promise you, but I will look into it." He says, "In fact, I have looked in the newspaper." He says, "I will have to agree with you girls, you are a little below par."
>
> Q. But did he say that he thought the company policy was to be competitive with what was being paid in the area?
>
> A. At our meeting, he just stated that he thought we were a little below par.
>
> Q. Did he every say he was going to do something about that if you voted against the union?
>
> A. He said he had already looked in the newspaper.
>
> Q. Did he say he was going to do something about it, raise your wages?
>
> A. Well, evidently he was going to do something one way or the other or he wouldn't have looked in the newspaper.
>
> Q. That is a conclusion.
>
> A. Or telling us that he would look into it.
>
> Q. That is a conclusion that you are drawing, an assumption, is it not?
>
> A. Why else would he look in the newspaper?

I find DeRaps' testimony here to be improbable. Moreover, it shows that DeRap tends to inject her per-

sonal conclusions into her testimony. It is improbable because it is unlikely that this Employer would concede that its wage scale was less than its competitors.[5] More likely is the response recalled by Martinez, Fuller and Dorge to the effect that Respondent was "on a par" with competitors. To concede that Respondent was not competitive would more than likely result in persuading undecided employees to vote for union representation. Moreover, as attorney Jordan notes in the latter portion of the quoted testimony, her testimony tends to be conclusionary.

Dorge's testimony, too, is subject to doubt. She virtually confessed she could not recall Tronson's statements with any degree of certainty. A principal example follows:

> Q. (By Mr. Jellison) When Mr. Tronson said, during this October 14th meeting on apparently several occasions, that he couldn't make any promises, did he couple that statement about he couldn't make any promises with any further statement?
>
> A. He couldn't make any promises, but the next statement would be, to the effect, that they couldn't—
>
> MR. JORDAN: I am going to object to this.
>
> JUDGE KENNEDY: I know what the objection is. Let's try and recall the exact words that he used, if you can. I think we may have used them a number of times already, but you go ahead and—
>
> WITNESS: I can't remember or recall exactly the words that they used. It was always we cannot make you any promises, but we will look into it. We will

[5] Elsewhere in this Decision I note that Tronson says he had determined the then current wage practice was not fully competitive and had numerous inequities. Despite that knowledge he had decided to campaign on the basis that Respondent was competitive. He used the newspaper want ads as evidence that it was even though he knew the want ads were not the best place to find accurate wage comparison information.

surely—since I can't say for word for word, but words are strange, and it is the way you say them not the words themselves. My own personal opinion—

MR. JELLISON: No, I don't want your personal opinion.

WITNESS: No. Okay. No personal opinion.

MR. JELLISON: All I want is what you can recall he said, if anything. If you can't recall any further, fine. But I don't want your personal opinion.

WITNESS: Okay. Then I will just drop it. But there was always a follow-up statement after we cannot make you any promises, but—it is not we are going to anyway, but it is—that is what I got. I am sorry.

In addition to casting doubt on her ability to adequately recall what occurred, I regard her testimony as demonstrating a tendency to interpret Tronson's words in the manner she wished to hear them. I think she sincerely believes Tronson made a statement implying that wages would be increased; I am equally certain that Tronson did not say such words. That she believed he had is not unusual in an electioneering context. Aside from representation elections, electioneering commonly includes promises, and I believe Dorge simply wanted to hear a promise so badly that she engrafted one to Tronson's actual statement.

I conclude therefore that at the first meeting on October 14 neither Tronson nor Teel made any expressed or implied promises that wage increases would be made in the event that the employees voted against union representation.

Also at that first meeting employees complained about Chief Accountant Cobb and Personnel Manager Gilmore. Both Tronson and Teel expressed surprise at the vehe-

mence of the complaint.[6] Tronson testified he replied that supervisors had supervisors and Cobb and Office Manager Greenlaw worked for him while Personnel Manager Gilmore worked for both Teel and Tronson depending on the area of inquiry. He went on to say his door was always open. Martinez said she knew she had access to anyone in the building including Respondent's owner, Raley.

DeRaps testified Tronson said he didn't believe Cobb's actions with regard to the incident about which the employees were complaining were correct, and he said he would meet with the supervisors to try to improve communications. Although Dorge testified Tronson said he would try to get Gilmore to improve his personal relationships with employees, that the Company was a family operation and he would try to keep it so, Dorge also testified Tronson said he would not change any personnel policies. Despite Dorge's statement, it is clear that the employees were principally concerned about Cobb, not Gilmore.

Martinez testified that, upon hearing the employees' complaint about Cobb, Tronson became upset saying that there should be a reason why Cobb was threatening employees; that Cobb would have to answer and Tronson would find out why. However, according to Martinez, he also said he was not going to go right upstairs to ask Cobb the questions. Fuller testified neither Teel nor Tronson said they would do anything with regard to the Cobb situation. Both Teel and Tronson deny saying they would look into the Cobb matter. Tronson and Teel both say Tronson pointed out that his door had always been open, and Tronson recalled saying he didn't see how the Union could help with the day-to-day relationship each employee had with

[6] It should be observed that there is no record evidence that Respondent's representatives knew or had reason to know that Cobb's July "pep talk" had triggered the Union's organizing drive.

his or her supervisor. Both Tronson and Teel testified an employee then observed that even if Tronson's door was open he wasn't always in his office. Both recall Tronson responding that, if he wasn't in his office, a note could always be placed in his mailbox.

Several other matters were discussed as well. Some employees complained about the existing sick pay program whereby employees were given a pre-Christmas check covering those days which they had been off sick during the year rather than receiving a normal paycheck during the year. Teel testified he told the employees that many years ago they had voted to have the sick pay program in the current manner. DeRaps testified that Tronson said that he would look into the matter and that perhaps employees could vote on it again. Dorge testified Tronson said that if people were unhappy about the current practice it could be looked into, but she also recalled Tronson specifically saying that he would make no promises about it. She recalled Tronson saying it had been voted on before and could be voted on again. Martinez testified that she recalled the employees' talking about the matter among themselves but that Tronson and Teel said little if anything on the subject. She recalls Tronson saying he didn't care which way the program worked. She specifically recalled he did not suggest another vote on the subject and that he had no decision to make about it. Fuller, who had raised the subject, recalled either Tronson or Teel saying that employees had elected to have it this way, and she replied she doubted people wanted it that way anymore. She recalled rather vaguely that either Tronson or Teel said it was "up to the employees to get it changed." Teel testified he explained how the program had come about and explained how it worked noting that it followed a policy set forth in the collective-bargaining agreement Respondent had with the Independent Drug Clerks Associa-

tion. He recalled Tronson's saying Respondent didn't care which way the sick pay program worked. Tronson corroborates Teel and testified that the reason he didn't care which way the program worked was because the way suggested by the employees would be slightly cheaper in that employees who quit during the year would probably not be paid for unused sick leave. Both deny suggesting that another vote be taken.

During this meeting, either Martinez, Jody Lowery, or Linda Smith told Tronson that when she was hired she had been promised the right to transfer to a retail store. Dorge testified that during this discussion Tronson said such transfers were against company policy but "could be looked into." She recalls Teel's saying that as far as they knew they weren't going to change the policy but "would look into it." DeRaps agrees that Teel said it was not company policy to permit transfers, but she says Tronson said he would "look into that." Fuller recalls Tronson's and Teel's saying that the Company had a policy against store transfers because employees couldn't use the office as a "jumping off place." She testified Teel said nothing about changing the policy. Martinez was not asked about the matter. Tronson testified that in response to the question raised by Lowery and Martinez he merely said it was against company policy to permit store transfers. Teel recalled that it was Linda Smith who asked the question about the store transfers. He, too, said it was against policy and she replied she'd been made the promise. Teel denies that he offered to change the policy.

It should be observed at this point that to each of these meetings Tronson brought at least two documents. The first was a copy of a questionnaire (not in evidence) which the Union had distributed to employees seeking to determine what the employees wanted; the second was a list of

matters which he believed should be discussed at the meeting. Dorge testified, with apparent reference to Tronson's use of the Union's questionnaire, that Tronson said he had looked into employee "grievances" and as there was some truth to them he would "look into them." She recalls he asked the employees to vote against the Union and to give the Company another chance. She says he said he wanted to do what was right and needed a vote of confidence from the employees; that what the Union could do the Company could do. However, she also recalled Tronson's saying he could not make any promises. Tronson, corroborated by Teel, recalled that when he used the Union's questionnaire, he merely pointed to some of the matters listed therein saying, "How could anybody be against that; to be against those things would be like being against motherhood and apple pie." None of the other employee witnesses corroborated Dorge's version.

2. Meeting 2

The General Counsel called no witnesses with regard to the second meeting; Respondent called employees Deborah England, Yvonne Morris, and Janice March. The meeting proceeded in the same general format. Tronson advised the group of the upcoming election, described its mechanics, and then proceeded to describe existing benefits saying the Company could make no promises or commitments. The principal difference was that, having previously heard the employees' complaints about Cobb and an expressed claim by employees that they were not familiar with the company hierarchy and that they did not know to whom they could turn, Tronson was more explicit about his and Teel's duties point out that Cobb and Gilmore reported to them. The three employees who testified with regard to this meeting were generally consistent. They testified that Tronson and Teel said they weren't at

the meeting to make promises but were there merely to state Respondent's position.

The first item which appears on Tronson's reminder sheet which he had with him was the statement: "We are precluded from making specific promises such as pay increases or other benefits." The use of the phrase "specific promises" triggered a series of questions by Respondent and the General Counsel flowing from the use of the phrase "specific promises." Their purpose was to show that if Tronson stated that he could make no "specific promises" a negative pregnant could be found because the promises would be implied and not specific. They asked both Morris and England if Tronson said he could not make "specific promises." Both, however, denied Tronson used the phrase "specific promises." Morris, March, and England all testified that Tronson and Teel said many times (estimated between three and six times) that they could make no promises. March recalled that was their response to "nearly everything." Moreover, she says neither Teel nor Tronson ever said, "[T]hey would look into things."

With regard to pay matters, Morris testified that pay was discussed mostly by the employees. When she asked Teel if the Union would get employees higher wages, Teel did not answer that question replying only that he couldn't make any promises and telling her his hands were tied. On direct examination, England could not recall that wages were discussed at all but did say Tronson never said he was going to conduct a wage survey. With regard to fringe benefits, she recalls Tronson's saying he "could not do anything at this point because of the Union and he could not make any promises to us at all." Tronson testified that during this meeting Morris asked him what the pay would be if the Union didn't win the election. He replied, "We

can't answer that," referring to his opening remark that neither he nor Teel could make any "specific promises." Thus, despite the employees' recollection that he did not use the phrase "specific promises," he admits on this occasion that he did. Despite this admission, I find no negative pregnant is justified as the employees clearly did not recall it occurring that way.

The complaints about Cobb were discussed at the second meeting as well. March and England both testified Tronson said the Company always had a policy that employees could come and discuss anything freely and his door was always open. England also testified Tronson said he did not think the Union could solve problems employees had with their immediate supervisors.

In addition, the matter of the sick pay program was discussed. Someone, probably Susan Corrin, complained about it, and Tronson said he understood the complaint, explained how the policy had been established, but reaffirmed the policy. Morris said employees asked if it could be changed and Tronson replied, "We can't make any promises at this time." England testified that Tronson did not mention voting about it again.

3. Meeting 3

The General Counsel called Jennifer Muschetto and Carol Huddleston to describe the third meeting. Respondent called Ed Entrican. The format followed the second meeting in which Tronson, in addition to describing the mechanics of the election and describing existing benefits saying he was not there to make promises or commitments, also described the fact that he and Teel supervised Cobb and Gilmore. Muschetto, Huddleston, and Entrican all agreed that Tronson and Teel said on a number of occasions they could not make promises. Mus-

chetto said that Tronson made that statement at least six times and Teel said it at least three times. Huddleston recalls Tronson saying it at least three times. Entrican recalls Tronson's and Teel's saying that they could not make promises and were there to answer questions. He recalled that, when problems were mentioned to them, they acknowledged their existence but said they could not promise to resolve anything. He recalls their saying their hands were tied because of "the law."

Huddleston testified that during the meeting she complained that wages and pay schedules were unfair. She testified: "When I was speaking of wages and how unfair the pay schedule was, [Tronson] agreed [with] me that he was—that seniority should be paid more than somebody hired off the street, and he was going to set up a pay scale, and that is the way I understood him." She also testified that at one point Tronson said Respondent's wages were competitive but he would "look into it." At another point she testified Tronson agreed with her that wages were unfair and not according to seniority, and he would look into it but would promise nothing. Muschetto testified: "The first matter brought up was pay because that was our major complaint, that we weren't making enough money, that most of us could barely get by on what we were making. He kept stating throughout the meeting that they couldn't promise us any pay increases, but that the matter would be looked into." Entrican testified that wages were discussed in the context of the newspaper. He said Tronson told the employees that the newspaper want ads showed Respondent's wages were not too far out of line. Although not specifically asked, the thrust of his testimony is that neither Teel nor Tronson said they would "look into" wages.

With regard to employees' complaints about Cobb, both Muschetto and Huddleston said employees described to

Tronson the way Cobb had discharged an employee and Tronson appeared surprised about it.[7] Huddleston said Tronson told them he was not aware of Cobb's "pep talks" and his threats of discharge. They said he explained his duties included personnel duties and that the Company had an open-door policy, and employees could talk to him privately about problems they were having. Muschetto testified Tronson said that messages could be placed in his box. Huddleston testified that Tronson said suggestions could be placed in his box and that he would also consider any wage information if it were put in his box. Entrican denied her version saying that Tronson did not mention the subject of a wage survey nor did he invite employees to submit wage information to him. Muschetto testified Tronson said, "If you have any problems come to us" and that he had never said anything like that before. Entrican testified that, after Muschetto complained about the manner in which an employee had been fired, Teel said he was not aware of the firing, but Tronson replied he was aware of it yet made no further comment. Entrican testified both Teel and Tronson said the Company had an open-door policy and if people had problems they could see either of them. Moreover, according to Entrican, Tronson said that if anyone didn't want to see him in person he or she could write him a note and put it in his mailbox.

Muschetto testified with regard to the sick pay program that Tronson explained how it started and told them they

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[7] I am unable to accept Muschetto's and Huddleston's claim that Tronson appeared surprised upon hearing the employees' complaint about Cobb. This was the third meeting and the third time he had heard it. He had even adjusted his introduction because of it. Certainly, there was no advantage to be gained by feigning surprise; indeed, it is probable that he would simply have said he was familiar with the complaint having already heard it twice that day. Thus, I regard their testimony as embellishment and casting suspicion on their testimony elsewhere.

could vote on it again. Huddleston said Tronson said he would look into it and see how the people felt but made no promise to change it. She said it was a matter to be left up to the employees, and he did not indicate what action, if any, he would take. Entrican said Teel described how it came about and then said that maybe it was time for a change but nothing could be done about it now because they couldn't promise anything.

Of these three only Huddleston was asked about the subject of store transfers. She said that either Teel or Tronson said it was not company policy to permit such transfers, but he would look into why someone had told employees that the Company permitted such transfers. She also testified that during the course of the meeting Tronson said that had he known about the employees' problems before he could have helped. He concluded, according to her, by saying, "Please give me another chance. Do not vote for the Union. If I fail you, you can always vote again. Put your trust in me."

With regard to Huddleston, I found her to be unable objectively to describe what she perceived. In her testimony quoted *supra*, she refers to the fact that she "understood" statements from Teel and Tronson rather than describing them. Moreover, at one point during her testimony she said that Tronson told her that in the event of a strike the Company could "fire us." No other employee corroborated that remark and in fact it was Teel who discussed the Company's rights in the event of a strike, not Tronson. Later on cross-examination, she virtually confessed she equated the word "replace" with the word "fire." Judging from earlier company campaign material, it is more likely he referred to the Company's right to replace strikers. I recognize that the distinction between the two words is not easy for a lay person; indeed, it is not easy for some lawyers. Nonetheless, in the context of this case,

where there is great disagreement about what was said, I do not believe it unfair to note this an example of Huddleston's inability to recount accurately what was said. Accordingly, although I do not find her to be unreliable, neither do I find her to be as reliable as Entrican, Tronson, or Teel.

With regard to Muschetto, although I find that she testified reasonably honestly, again I do not believe her recollection was as good as that of the other witnesses. Moreover, on one occasion, after testifying she was unaware that the Company had an open-door policy, she was asked if she knew if other employees had ever taken up any problems with either Tronson or Teel before the October 14 meeting. She replied that she knew of employees who had taken such problems up with Tronson and Teel. However, she immediately retracted that saying she didn't know whether or not anybody had. Again, although I do not believe this testimony to be particularly significant, it does tend to show her lack of clear recall.

Both Tronson and Teel testified that it was difficult for them to recall each meeting specifically as they tended to run together in their minds. They are adamant in their assertions that they made no promises. Indeed, both recall saying several times that they could make no promises because they were precluded by law from doing so.

As noted elsewhere in this Decision, no party called any employee witness with regard to the fourth meeting which was held on October 15. Thus, only Tronson and Teel testified about the fourth meeting but only in general terms.

### F. *Respondent's Preelection Correspondence to Employees*

On September 7 and October 8, Teel wrote the voting unit employees letters in which he argued against union

representation. In neither of these letters did he make any remark which any party considers to be improper. On October 8, he also sent a copy of those letters to the advertising department and printshop employees who had just been added to the voting unit by the Regional Director.

On October 19, the day before the election, Tronson responded by memo to a union campaign claim dealing with contracts it had with office employees of two competitors. In particular, he cited certain wage inequities that he believed the Union had done nothing about. He concluded his memo as follows: "As we have point out, we are unable to quote any rates since this could be construed as an attempt to make promises relative to proposed rates. But any subsequent changes in rates will be based on all information we have available to us."

### G. *The Postelection Wage Increase*

On October 22, 2 days after the election, Tronson issued a memo to all office employees and their supervisors. In that memo he advised that he was in the process of making a detailed salary evaluation based on information available to him. He said, if any of them had information regarding salary schedules for Sacramento area groups, he wished that information could be submitted to him so it could be included in the study. He further advised there would be rate change retroactive to October 25.

On November 12, Tronson actually announced the specific wage changes. This was done by issuance of a pay schedule with an effective date of October 26. This schedule (G.C. Exhs. 4 and 4(b)) divided the central office employees into four categories; (1) Accounting clerks; (2) lead clerks and payroll clerks; (3) general office clerks, printing machine operator, and assistant sign painter; and (4) secretaries (except executive), leadman-printshop, and ad-

vertising aides. It then set forth four hourly wage schedules based upon months of service.

The adjustment of pay scales according to seniority was a change from the existing practice. The previous pay system for these employees can only be described as a "non-system." It appears to be the result of the lack of effective controls. Junior employees were often paid more than more experienced employees, although each was doing approximately the same job. Over the years this had resulted in a number of inequities. Tronson explained that the seniority application was an effort to remedy these inequities.

Nonetheless, other aspects of these increases raise certain questions. Because of the injection of the seniority factor, it would not be unusual to expect the raises to vary either in the amount of money or in terms of the percentage increase. Nonetheless, the overall size of the increase was quite large, in one case $1.45 an hour or an increase of 32 percent. In addition, the increase affected virtually all of the employees in the voting unit. Moreover, there is the question of the timing of the increase. Tronson testified that raises were generally given every 6 months. The last increases had been given in June to 18 employees and in July to 4 more. Examination of the payroll records shows that Respondent's practice between January 1974 and October was inconsistent at best. In the 33 months between January 1974[8] and October, there were only 5 months in which one employee or another did not get some sort of increase. It does appear that in April 1974 a general increase was given, although not to everyone, as were in-

[8]The records in evidence do not show if raises were actually given in January 1974; that month is used to show pay rates in effect as of that month. While it is probable that raises were given in that month, I have not counted it for that purpose.

creases in February and March 1975, June 1975, December 1975, and, as previously noted, June. None of the pre-October increases was very large. For example, in December 1975, Yvonne Morris received a 9-cent hourly raise increasing her rate of $3.03 to $3.12. In June, she received a 17-cent raise to $3.29. However, her October increase was to $4.04, a jump of 75 cents. That figure, of course, is pursuant to the new schedule and it is accordance with her length of service. Huddleston, an example cited by the General Counsel, is even more dramatic. In January 1974, her rate was $2.31. In July 1974, she received a 9-cent increase; in January 1975, 10 cents; in March 1975, 17 cents; in June 1975, 17 cents; in September 1975, 6 cents; in December 1975, 6 cents; and in June, 23 cents, to her then rate of $3.17 an hour. However, in October, she was jumped to $4.62, an increase of $1.45 per hour. This, too, is in accordance with her seniority under the new schedule. To put her increases in some perspective, however, it should be noted that, although her general category now is accounting clerk, a generic classification for all of the functions she has performed, nonetheless she has performed different duties since she was originally hired in 1972. No doubt, as her duties changed, her rates of pay changed as well. This may well account for the number of pay-rate changes noted herein.

Respondent's Explanation of the Wage Schedule

Tronson explained that, because an increase had been given in June, he could not understand why the employees had sought union representation in July. Accordingly, he looked into the wage structure to see if that was an area of employee dissatisfaction. He testified that, prior to the June increase, he had given instructions to Chief Accountant Cobb to implement the June increase in accordance with a wage survey conducted by the Sacramento Valley

Employers Council. He said he had told Cobb to put the office employees into the midrange of that survey. Thus, he says, when he began investigating after the filing of the petition, he learned that Cobb had not followed these instructions. In addition to failing to place the employees in the proper range, according to Tronson, Cobb had also failed to take into account an instruction to upgrade the employees from the "general" category to a skilled category. This directive, he said, was a result of a gradual conversion to electronic cash registers. He said the first one was installed in late 1974 but it was not until mid-1975 that a large number were installed. He said that these cash registers record a great deal more data than the displaced registers. Accordingly, the office clerks who reviewed the data had to expand their duties and thus their skills increased. The records are inconclusive with regard to whether or not the small number of wage increases which occurred during mid-1975 had anything to do with the skill level or duties of the accounting clerks.

According to Tronson, when he discovered Cobb's error, he decided to do nothing about it because Attorney Jordan had earlier advised him that the Company could not make any promises or grant any pay increases until after the election. At that point, Tronson says he decided to concentrate on the election and wait until December. Teel testified that Tronson told him of Cobb's error sometime in June. In any event, after the election turned out favorably, the two decided that Respondent had run a "clean campaign" and was now free to do what it wanted. Thus, according to them, they decided not to wait until December but to implement the corrections as soon as they could. It was for this reason that Tronson issued his October 22 memo requesting the wage information and advising that an increase was forthcoming. No testimony was taken with regard to the manner in which Respondent

reached the wage schedules announced on November 12, retroactive to October 26.

## IV. ANALYSIS AND CONCLUSIONS

### A. *Preelection Conduct*

I have previously noted that this case presents difficult questions of crredibility. I have already resolved the question of whether or not Tronson on October 14 and 15 implicitly promised a wage increase and concluded that he did not. Even his October [illegible] memo is not an implied promise. It simply repeat[illegible]hat he had said at the meetings and then stated th[illegible]vious—that future wage increases would depend on i[illegible]mation to be discovered in the future. That could eas[illegible] have included union wage demands. I therefore find this memo perfectly lawful.

However, other questions remain to be more fully resolved. In resolving these matters I have taken into account many things. I have noted that Respondent has little, if any, antiunion animus. It has a long relationship with the Charging Party, as well as other locals of the same International Union. In other bargaining units it recognizes three other unions as well.[9] Moreover, Attorney Jordan's admonitions to Tronson and Teel to the effect that they made no promises and grant no wage increases are not without weight. I have also considered the possibility that certain of the employees called by Respondent may have had a bias. Martinez wrote an open letter to em-

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[9] A mild irony is the fact that Respondent was recently found guilty of giving unlawful assistance to the Charging Party with regard to the representation of certain drug clerks, who properly belonged to the Independent Drug Clerks Association's bargaining unit. See *Raley's, Inc.*, 227 NLRB 670 (1976). Thus, it appears that Respondent may actually favor the Charging Party in some circumstances. This is not to say, of course, that Respondent welcomed the Charging Party as the representative of its central office employees.

ployees in which she argued against representation by the Union having apparently been offended by some of the Union's tactics. Nonetheless, I did not find her testimony colored to any great extent. So far as I could tell she testified in a straightforward, honest manner. Moreover, she is corroborated to a high degree by Fuller, who, for the most part, was a very impressive witness. Indeed, she was one of the employees most offended by management and also in need of the higher wages the Union could be expected to negotiate. Yet, her testimony was consistent with that of Tronson and Teel.

The most important factor I have considered, however, is the undisputed fact that Tronson and Teel said over and over again that they could not make any promises or commitments. Estimates of the number of times this was said ranged from 3 to 10 per meeting. Two witnesses (March and Entrican) testified that nearly every response made by either Tronson or Teel was prefaced by a statement to the effect that promises could not be made.

In view of these factors, and the mistrust of certain witnesses' recollection noted earlier, I reject the assertions that Tronson and Teel made any express or implied promises with regard to: (1) A wage survey; (2) changing the sick pay policy; and (3) changing the policy against transferring to a retail store.

With regard to the wage survey matter as an implied promise of a wage increase, I believe DeRaps, Muschetto, and Huddleston are simply mistaken. This testimony was clearly denied by Fuller, Martinez, England, and Entrican. Respondent's argument that the postelection request for information would be a useless act if a request had been made before the election is persuasive. Moreover, the testimony of DeRaps, Muschetto, and Huddleston is doubted for the reasons previously expressed.

As far as changing the sick pay policy is concerned, I am not persuaded the testimony of DeRaps, Dorge, Muschetto, and Huddleston is as convincing as that of Martinez and Entrican. Moreover, Tronson and Teel's continuous statements that no promises could be made outweight, in my opinion, any testimony to the contrary.

Finally, with regard to the matter of store transfers, I am likewise not convinced. I recognize that Dorge and DeRaps testified to the effect that the policy would be looked into. Huddleston said that they would only look into why employees were being misled about the policy. Entrican denies that Tronson or Teel said they would look into the policy. It appears to me that the policy prohibiting office employees from transferring to the store was a strong one, and, after weighing all the evidence, it appears improbable that Tronson or Teel would imply that such a strong policy could be changed.

Several other matters remain for discussion. At various points witnesses said that Tronson or Teel said changes of one sort or another could not be made "because of the Union" or "at this time." If taken literally, of course, those statements could be construed to mean that benefits were being denied because of the Union's presence. If that was the intent, a violation of Section 8(a)(1) would be made out. However, I regard those statements as careless recollections or imprecise shorthand for what was actually said. I believe it is clear that Tronson and Teel actually said that their hands were tied because they were prohibited by law from making promises of benefit. Moreover, any reference made to time was simply a reference to the fact that they could not make promises so long as the election petition was pending. Such statements are in accordance with the law, and I shall not condemn them merely because of the inaccurate recollections of employees.

In addition, I am aware the Board has held that when an employer, who has not previously done so, offers employees an opportunity to "air their complaints" in response to union organizing, it violates Section 8(a)(1), because there is a compelling inference to be drawn that the complaints will be remedied. *Reliance Electric Company, Madison Plant Mechanical Drives Division*, 191 NLRB 44, 46 (1971),[10] citing *Raytheon Company*, 118 NLRB 311 (1971). See also *F. W. Woolworth Co. (Store No. 2288)*, 188 NLRB 941 (1971). However, I do not believe those cases are controlling here. First, Tronson credibly denied soliciting any complaints; and, second, although he did not cut them off when they came, both he and Teel repeatedly said they could make no promises. I regard those statements as effectively negating any inference which might otherwise be drawn that employee complaints would be remedied.

Finally, I do not find Tronson's reference to the existing open-door practice, even if it were not a previously announced policy, to be an implied promise to resolve grievances. It merely called employees' attention to an existing condition of employment. That is certainly lawful. See *Schwab Foods, Inc., d/b/a Scotts IGA Foodliner*, 223 NLRB 394, fn. 1 (1976). Even where he was responding to a complaint about Cobb, he did not imply he would solve the employees' complaints against Cobb but only pointed out that Cobb had superiors as well, and that it was Respondent's desire to keep lines of communication open.

The General Counsel's contention that the open-door policy was something new is clearly without merit.[11] Ac-

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[10] Enfd. 457 F.2d 503 (C.A. 6, 1972).

[11] In 1975, after a payroll clerk had been terminated, Tronson explained the circumstances of the discharge to certain employees in order to maintain morale, thereby identifying himself as having per-

cordingly, I conclude that, on October 14 and 15, Respondent neither solicited grievances with promises of resolution thereof, nor did it promise benefits, including pay increases, in the event that the employees voted against union representation. I shall therefore recommend that the complaint be dismissed in those respects.

B. *The Postelection Wage Schedule Adjustment*

The General Counsel and the Charging Party argue that the November 12 wage adjustment was intended as a reward to the employees for having voted against union representation. Indeed, the Board has held on numerous occasions that a reward of this nature does indeed violate Section 8(a)(1).[12] The Board has also found employers to have violated Section 8(a)(1) by the granting of postelection benefits in situations where it is clear that the em-

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sonnel authorization. In 1976, accountant Entrican complained to Tronson because Cobb had assigned him to a new position. In June, Sunny Fuller went to Tronson to request a week's pay in lieu of a vacation, a request which Cobb had refused to grant. About the same time, Julie Hoffman made a complaint to Teel about Gilmore. In the early part of the year, printer Dave Lewis went to Teel requesting him to overrule Gilmore's denial of the right to purchase some printing equipment. Once, a sign shop employee bypassed his supervisor by going directly to Teel to ask that certain shelving be constructed. In late 1975, employee DeMario's stereo equipment, which was being used by the advertising department, was stolen. DeMario went to Teel to ask him to override Gilmore's refusal to compensate him for the loss. Martinez testified that she knew she could approach any supervisor; she never thought there were any closed doors. Muschetto at one point started to admit that she was aware that employees had taken up problems with Tronson and Teel; later, she recanted, saying she didn't know. Based on these instances, it is difficult for me to conclude that an open-door practice was not in effect. That some matters which were discussed were more closely related to personnel than others (i.e., vacation policy variance versus reimbursement for stolen stereo equipment) does not change this conclusion.

[12] E.g., *Eagle Material Handling of New Jersey*, 224 NLRB 1529 (1976), enfd. 558 F.2d 160 (C.A. 3, 1977); *Westminster Community*

ployer sought to obtain an advantage in the event a second election was ordered.[13]

There is even at least one case holding that a grant of benefits during the period for filing objections violated Section 8(a)(1) and therefore was cause to set the election aside. *F. W. Woolworth Co. (Store Number 2288)*, *supra* at 948. However, the question of whether or not postelection violations of Section 8(a)(1) are grounds for setting the election aside appears to have been repudiated by the Board in *Shulman's Inc. of Norfolk*, 208 NLRB 722 (1974).

Ultimately, of course, the question of whether a postelection grant of benefits violates Section 8(a)(1) is a question of fact; i.e., was the purpose of the grant to interfere with the employees' Section 7 rights or was it for some other purpose? The only way that question may be answered is from an analysis of all the surrounding circumstances. In my opinion, such an analysis dictates the conclusion that Respondent's November 12 readjustment of the wage structure was not made for the purpose of rewarding employees for rejecting the Union or for seeking an advantage in the event of a second election.

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*Hospital, Inc.*, 221 NLRB 185 (1975), enfd. as modified 566 F.2d 1186 (C.A. 9, 1977); *F. W. Woolworth Co. (Store No. 2288)*, *supra*; *C. E. Collins and O. C. Collins, d/b/a Collins Mining Company*, 177 NLRB 221 (1969), enfd. *per curiam* 440 F.2d 1069 (C.A. 6, 1971); *Decoral Corporation, etc.*, 163 NLRB 146 (1967), enforcement denied 397 F.2d 488 (C.A. 7, 1968); *Gal Tex Hotel Corporation, d/b/a Admiral Semmes Hotel and Motor Hotel*, 154 NLRB 338 (1965); *Northwest Engineering Company*, 148 NLRB 1136 (1964), enfd. 376 F.2d 770 (C.A.D.C., 1967).

[13] E.g., *Felsenthal Plastics, Inc., now known as Grede Plastics, a Division of Grede Foundries, Inc.*, 224 NLRB 1312 (1976); *Centralia Container Corporation*, 195 NLRB 650 (1972); *Ralph Printing & Lithographing Co.*, 158 NLRB 1353 (1966), enfd. as modified 379 F.2d 687 (C.A. 8, 1967).

In reaching this conclusion, it is not necessary to determine whether or not Tronson gave Cobb directives in June regarding that wage increase or whether Cobb failed to implement them. Nor is it necessary to determine whether or not the skill levels of the employees has risen to such an extent as to justify an upgrade from a "general" office employee to some sort of "skilled" level. When he scrutinized the salary structure of the office employees, Tronson learned it was not structured at all. Indeed, it had little rhyme or reason. Newly hired employees with little or no experience were being paid an amount equal to or more than experienced employees. Common sense tells me that such a situation would rapidly create a morale problem together with a concomitant risk of loss of efficiency, not to mention the probable higher risk of losing experienced employees.

In the face of those risks, it is not surprising that Tronson and Teel decided immediately after the election to remedy the topsy-turvy system which had come into existence. Nor am I surprised that it was done promptly after the election rather than awaiting the December or January increase. Potential morale problems flowing from the existing practice had been courted long enough. There was no sense in extending that invitation to trouble and prolonging that risk.

While the timing itself raises a suspicion about Respondent's motive here, the fact that Respondent had demonstrated no antiunion animus prior to the election weighs heavily in determining the purpose of the wage restructure. Had Respondent previously promised a wage increase or relief from the old system, it would be easy to conclude that its implementation was the fulfillment of that promise. However, unlike the "reward" cases cited *supra*, there is no evidence supporting that view. Tronson's October 22 memo cannot be taken as evidence of an

expression of gratitude except by strained inference. Unlike the facts in some of those cases, the memo did not thank the employees for their vote; and, unlike the "advantage" cases cited *supra*, the memo did not link the wage increase to the election or to possible objections. Thus, it is not reasonable to conclude that the readjustment was intended to obtain an advantage in the event of a second election. Indeed, the likelihood of a second election appeared remote to Tronson and Teel, and their seeking an advantage in a second election does not appear to be a reasonable probability.

I conclude therefore that Respondent's intent and purpose[14] in making the postelection wage adjustment was not to interfere with the Section 7 rights of its employees, but was instead for a legitimate business consideration.[15]

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[14]The Court of Appeals for the Third Circuit has recently said: "Whether a post-election conferral of benefits constitutes an unfair labor practice depends, we believe, on the employer's purpose in granting the benefits." *N.L.R.B.* v. *Eagle Material Handling, Inc., et al.*, 558 F.2d 160, 165 (C.A. 3, 1977). The Board appears to agree with this test. See *Evansville & Ohio Valley Transportation Co., Inc.*, 223 NLRB 184, fn. 2 (1976), where the Board said it was relying on the Administrative Law Judge's finding that a benefit grant "was made without intent or purpose of interfering with the employees' statutory rights nor to influence the outcome of the pending election and that such benefits would have been granted whether or not the Union had been in the picture." Member Jenkins did not rely on the absence of "intent or purpose."

[15]Tronson's assertion that even as early as June the Company was trying to upgrade wages according to skills and to pay its employees in accordance with a community wage survey cannot be ignored. Of course, by the time the new structure was put into effect in November, the March rates shown in the Sacramento Valley Employers Council survey were 8 months out of date. Moreover, Tronson had asked for, and no doubt received, more up-to-date information. Thus, comparison of the November wage schedule with the Sacramento Valley Employers Council survey would not be useful. Certainly, neither the General Counsel nor the Union made any attempt at the hearing to determine the factors Tronson eventually relied on.

Cf. *Evansville & Ohio Valley Transportation Co., Inc., supra;* and *Mr. Fine, Inc.*, 212 NLRB 399, 403–404 (1974); *Erie Technological Products, Inc.*, 218 NLRB 878, 883 (1975); *Advance Envelope Manufacturing Company, Inc.*, 170 NLRB 1459 (1968); *Hydraulic Accessories Company*, 165 NLRB 864, 870 (1967); *Falcon Plastics—Division of B-D Laboratories, Inc.*, 164 NLRB 786, 794 (1967), enfd. 397 F.2d 965 (C.A. 9, 1968). I shall therefore recommend that the complaint be dismissed with respect to the post-election wage adjustment as well.

### V. THE ELECTION

In view of my finding that Respondent did not violate Section 8(a)(1) of the Act during the preelection critical period in Case 20–RC–13645, I shall recommend that the objections, all of which track the alleged unfair labor practices, be overruled, and that the election results be certified.

Upon the foregoing findings of fact and upon the entire record in this case, I make the following:

### Conclusions of Law

1. Respondent Raley's, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union, Local 588, affiliated with Retail Clerks International Association, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, on October 14 and 15, did not solicit grievances from employees concerning their working conditions in order to discourage them from joining or supporting the Union or designating or selecting the Union as their collective-bargaining representative, nor, on that same date, did it promise employees improved wages or

other benefits if the employees voted against union representation, and therefore it did not validate Section 8(a)(1) of the Act.

4. Respondent, on or after October 26, did not change the wage structure of its central office employees in order to reward them for having voted against union representation or in order to obtain an advantage in the event a second election were ordered, and therefore it did not violate Section 8(a)(5) and (1) of the Act.

[Recommended Order for dismissal omitted from publication.]

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